United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1057

To be argued by
RICHARD J. HOSKINS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1057

UNITED STATES OF AMERICA,

Appellee,

—v.—

IRA FEINBERG,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Ira Feinberg appeals from a judgment of conviction entered on January 24, 1975, in the United States District Court for the Southern District of New York, after a 16-day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment 73 Cr. 464, filed on May 17, 1973, charged Feinberg, Ivan Ezrine, Jack Naiman, Chris Netelkos, Benjamin Werner, Joseph Delmonico, and Manor Nursing Centers, Inc. in thirty counts with conspiracy in violation of Title 18, United States Code, Section 371 [Count 1]; securities fraud in violation of Sections 10(b) and 32 of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder (Title 15, United States Code, §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5), and Title 18, United States Code, Section 2 [Counts 2-14]; mail fraud in violation of Title 18, United

States Code, Sections 1341 and 2 [Counts 15-28]; making a false statement to an agency of the United States in violation of Title 18, United States Code, Sections 1001 and 2 [Count 29]; and filing with the Securities and Exchange Commission a Form 10-K annual report containing false statements, in violation of Sections 15 and 32 of the Securities Exchange Act of 1934 and Rules 15d-1 and 12b-20 thereunder (Title 15, United States Code, §§ 78o, 78ff; 17 C.F.R. §§ 240.15d-1, 240.12b-20), and Title 18, United States Code, Section 2 [Count 30]. Counts 29 and 30 were severed on the Government's motion prior to trial (Tr. 10-13),* so that the trial proceeded on the charges of conspiracy, securities fraud and mail fraud.

Trial commenced on November 12, 1974 as to Feinberg and Delmonico.** On December 9, 1974, the jury found Feinberg guilty on the conspiracy count [Count 1], on six of the securities fraud counts [Counts 9-14], and on eight of the mail fraud counts [Counts 21-28] and acquitted him on all other counts. Delmonico was acquitted on all counts in which he was named.

On January 24, 1975 Judge Lasker sentenced Feinberg to concurrent terms of eighteen months imprisonment on each count. Feinberg is free on bail pending appeal.

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* "Tr." refers to the transcript of the trial; "GX" refers to Government Exhibits in evidence at trial; "Br." refers to appellant's brief; "App." refers to the appellant's appendix.

** Ezrine, Naiman, Netelkos, and Werner pleaded guilty before trial. Manor was severed from the individual defendants prior to trial.

Statement of Facts

The Government's Case

1. The offering

In connection with a $4.5 million public offering of its shares, Manor Nursing Centers, Inc. ("Manor"), filed with the Securities and Exchange Commission a prospectus (GX 11) dated December 8, 1969, the effective date of the registration. The offering, which was to be completed by March 6, 1970, was for 450,000 shares of stock: $350,000 shares at $10 per share ($3,500,000) for the account of the company and 100,000 shares at $10 per share ($1,000,000) for selling shareholders. The largest selling shareholder was Feinberg, president and a member of the board of directors of Manor, who was selling 62,500 shares ($625,000 worth), but would still be the holder of more than 55% of Manor stock after the completion of the offering.

The prospectus clearly specified that the offering was on an "all or nothing" basis: unless all 450,000 shares were sold within 90 days, the offering was to terminate and all funds collected would be returned immediately to the purchasers.

The Government's evidence established a three-stage fraud engineered by Feinberg and Ivan Ezrine, counsel to Manor: (1) a series of undisclosed payoffs and special inducements to get the stock sold; (2) a sham "closing" on February 20, 1970 at which millions of dollars in worthless checks were delivered while only a fraction of the 450,000 shares were paid for with good money; and (3) a deliberate cover-up of the enormous deficiency in sales of the shares, including the filing with the SEC of a "sticker" amendment to the prospectus declaring that the issue had been successfully sold.

2. Undisclosed payoffs and special inducements

a. Netelkos

Chris Netelkos, a co-defendant who pleaded guilty to the conspiracy count of the indictment before trial, was chairman of the board of Carlton-Cambrige, a New Jersey securities broker-dealer, when he met Feinberg in late 1969. (Tr. 160-61) During December 1969 and January 1970 Netelkos agreed to distribute through Carlton-Cambrige 30,000 shares of Manor in return for an undisclosed special commission of $1 per share in cash to be paid by Feinberg personally to Netelkos. (Tr. 160-65, 174-80) Later, there were new agreements as Feinberg experienced increased difficulty selling the issue. Feinberg agreed to provide a $250,000 loan to Netelkos (never disclosed) who needed it to purchase a partnership in Orvis Brothers, a Wall Street brokerage concern, in return for which Netelkos would "purchase" approximately a million dollars worth of stock at the closing with worthless checks which Feinberg promised to make good from the proceeds of the closing. (Tr. 181-82, 195-96, 202-07) Netelkos also agreed that he would make a market at $10 a share in the stock after it began trading. (Tr. 224-26)

b. Deneso

The principals of the Deneso Corporation were co-defendants Jack Naiman and Joseph Delmonico. During a series of meetings among Naiman, Feinberg, Ezrine, Delmonico and others in early 1970, Deneso was promised substantial undisclosed compensation, along with puts and calls, in return for its purchase of a large block of stock through bank financing. Pursuant to the final agreement Deneso purchased at the closing $1.7 million of stock with checks drawn on insufficient funds, and received for its services $35,000 in cash and $105,000 in checks from the underwriter, Benjamin Werner, and Ivan Ezrine. (Tr. 741-48, 757-62, 1915-29; GX 42-44)

c. Other undisclosed special inducements

There were a number of other undisclosed payoffs and special arrangements, including the following:

(1) In a sham transaction designed to show a flow of monies into Manor, David Haber purchased 60,000 shares at $10 in early March, after receiving a put guaranteeing their resale at $10, as well as 10,000 additional shares and a promise that his stock would be repurchased, at his option, at $11. The day after the purchase Haber returned the 60,000 shares and received back a $600,000 certified check. (Tr. 1211-25, 1058-61, 1065-66)

(2) In February 1970 Feinberg persuaded Emerson Nursing Home to purchase $100,000 of Manor stock with money Manor owed to Emerson. To guarantee that Emerson could not lose money on the purchase, Feinberg gave the president of Emerson two checks, each for $100,000, received one back endorsed by Emerson for the purchase of stock, and told Emerson to keep the second check as a hedge against the market price of Manor falling below $10 during a 90-day period. (Tr. 94-115, 1036-38, 1884-93)

(3) At the closing Feinberg wrote checks for approximately $114,000 worth of stock in the names of two friends, Orlins and Shelomith. Orlins later received another 5,500 shares. Neither man was aware of the purchase at the time it was made. Later, Feinberg told each of them that he need not pay for the stock and that if any profit were made upon the sale, he could keep it. (Tr. 970-75, 1071-73, 1911-14; GX 51-52)

(4) Ronald Klim, Feinberg's stock broker, received $2,500 in undisclosed commissions for promoting the sale of Manor stock to his customers. (Tr. 1025-28, 1901-07; GX 60-60a)

(5) Jack Badash received $3,000 worth of stock to induce his purchase of $30,000 worth of stock, in effect purchasing 3,000 shares of Manor at $9 a share rather than $10. (Tr. 1025-28, 1882-84; GX 61, 61a)

(6) Finally, the face of the prospectus disclosed that Robert Crespi was to be paid a "finder's fee" of $25,000. Crespi testified that he was really being paid to help sell the issue under an arrangement whereby Crespi, Feinberg and Ezrine agreed that Crespi would return one-third of the fee to Feinberg and one-third to Ezrine. (Tr. 77-79)

3. The "closing" of February 20, 1970

Despite the payoffs and special arrangements, it soon became apparent that it would be impossible to sell the 450,000 shares at $10 within ninety days. Nonetheless, arrangements were made for a closing on February 20, 1970, despite the fact that the underwriter, Benjamin Werner, had told both Feinberg and Ezrine that he had been able to sell only 30,000 shares. (The issue was a "best efforts" underwriting.) (Tr. 1013-16)

At the closing, Netelkos presented $832,500 in worthless uncertified checks pursuant to his agreement with Feinberg (Tr. 181-82, 195-96, 202-11, 1039; GX 14-15); Joseph Delmonico on behalf of Deneso presented $1.7 million in worthless uncertified checks pursuant to the agreement with Feinberg and Ezrine (Tr. 760-63, 1036-42; GX 46-48). Feinberg presented uncertified checks drawn by him on insufficient funds in the approximate aggregate amount of $250,000 (Tr. 1036; GX 5, 37, 64); and Ezrine presented over $350,000 in uncertified checks drawn by him on insufficient funds. (Tr. 1040-41; GX 65-66). In fact, less than $800,000 in real collectible funds was turned over at the closing.

Having received at the closing checks (mostly uncertified) which on their face totalled slightly more than $4 million ($4.5 million less commissions), the underwriter gave Feinberg the selling shareholders' checks, including a check for $559,000 for Feinberg himself. However, Werner cautioned Feinberg that there were not sufficient funds to cover the checks, so they must be held a few days before deposit. (Tr. 1020-29)

4. The cover-up after the closing

On the next trading day after the closing, February 24, 1970, Manor shares appeared in the "pink sheets" and began selling in the over-the-counter market. On February 25, Benjamin Werner, the underwriter, was informed by his bank that more than $3 million in checks deposited by Werner from the closing had bounced. (Tr. 1049-51; GX 71) Werner immediately stopped payment on the checks for selling shareholders earlier delivered to Feinberg. However, the $559,000 check to Feinberg had already been deposited and paid by Werner's bank. (Tr. 1050)

Werner talked to Feinberg and Ezrine several times during the next week. Both sought to calm Werner and told him that they would get in touch with their "clients" and see to it that the checks were paid. (Tr. 1053-55) Nonetheless, Werner threatened to "go to the SEC and blow up the whole deal." (Tr. 1055) A few days later, a friend of Ezrine's and Werner's came to Werner's office and persuaded him not to go to the SEC. (Tr. 1056-58)

The $832,500 in checks presented at the closing by Netelkos was technically for purchases by Carlton-Cambrige. Because of the total quantity of its purchases, the attorney for Carlton-Cambrige demanded that a "sticker" amendment to the prospectus be filed stating that Carlton-Cambrige might be deemed a statutory underwriter under the Securities Act of 1933 (Tr. 218). Ezrine arranged for the actual printing of the sticker (GX 119) which, although dated February 24, 1970, was actually first given to the printer on the evening of February 26 and completed by the printer on February 27, several days after Feinberg and Ezrine knew that the "closing" had been a failure. (Tr. 1293-95) The sticker amendment was received by the SEC on March 2, 1970 (GX 122), and read in part as follows:

> "Aggregate net proceeds of $4,027,500 were received by the Company ($3,132,500) and the Selling Stock-

holders ($895,000) from the Underwriter on February 20, 1970, from the sale of the 450,000 shares offered hereby."

The filing of the sticker was followed by a series of frantic efforts both before and after March 6 to make the representation in the sticker come true: the illusory David Haber transaction (*supra,* p. 5); the preparation by a public relations firm (based on information provided by Feinberg) and distribution of "tout sheets" or financial profiles of Manor designed to generate sales of Manor stock (Tr. 247-50, 1849-55; GX 22-23); and, for the purpose of concealing the fraud, the preparation of two letters dated March 5, 1970 (GX 76-77) signed by Feinberg stating that $3,132,500 had been received by the Company from the offering, as well as the preparation by Netelkos, with Feinberg's agreement, of a back-dated promissory note in the amount of $622,500 backed by forged documents purportedly showing a balance of $632,500 in Netelkos' favor in a Swiss bank account, which, in fact, never existed. (Tr. 290-305; GX 33-35)

Despite the determined ingenuity of these efforts, however, there was never a time when the total sales of Manor's $4,500,000 new issue approached even a third of that amount.

Defense Case

The defense witnesses were Seymour Weiner, Manor's auditor, several character witnesses, and Feinberg himself.

Feinberg testified that he was told by Ezrine in January 1970 that there was difficulty in selling the Manor issue and that Feinberg should sell all he could to friends and associates. (Tr. 1428-32) He attended the closing and, while at first the proceeds fell short, Feinberg left the closing with the impression that it had been entirely successful and proper. (Tr. 1499-1503) When he learned shortly thereafter of the millions of dollars in bounced checks presented at the closing, he relied on Ezrine's advice that everything was all

right and that they should merely continue to try to make sales. (Tr. 1501-07)

In addition, Feinberg admitted agreeing to a $250,000 loan to Netelkos in connection with the latter's sale of Manor stock, but denied that there ever had been an agreement about extra cash compensation (Tr. 1465-69, 1907-11); admitted knowing that Deneso was getting paid special compensation for its purchases, but claimed that it was all set up by Ezrine (Tr. 1915-29); admitted paying the proceeds of the offering to the selling shareholders, including himself, but said that Ezrine had instructed him to (Tr. 1747-51); and essentially admitted his knowledge of or participation in the arrangements with Emerson Nursing Home (Tr. 1884-93), Ronald Klim (Tr. 1901-07), Jack Badash (Tr. 1882-84), and Orlins and Shelomith (Tr. 1911-14). However, with respect to all these matters, he claimed that he was acting in reliance on the advice, explicit or implied, of Ezrine.

As the verdict reveals, the jury rejected these protestations of good faith.

ARGUMENT

POINT I

FEINBERG'S PRIVILEGE AGAINST SELF-INCRIMINATION AND RIGHT TO DUE PROCESS OF LAW WERE NOT VIOLATED BY SEC ADMINISTRATIVE PROCEEDINGS AND THE CIVIL TRIAL PRIOR TO INDICTMENT.

In the fall of 1970 the Securities and Exchange Commission entered an order of investigation in the matter of Manor Nursing Centers, Inc. On February 12, 1971 Feinberg testified before the SEC as part of that investigation. On August 16, 1971 the SEC commenced a civil action (71 Civ. 3627) in the Southern District of New York against Feinberg, Ezrine and others connected with Manor resulting in a decision by Judge Motley on October 19, 1971 finding against the defendants, granting injunctive relief, and providing for the appointment of a trustee to disgorge the defendants' profits and reimburse the defrauded public investors. *Securities & Exchange Com'n* v. *Manor Nursing Centers, Inc.*, 340 F. Supp. 913 (S.D.N.Y. 1971). Except as to a detail regarding the definition of those entitled to reimbursement, this Court affirmed. 458 F.2d 1082 (1972). Thereafter, a trustee was appointed and more than $600,000 was recovered from the defendants and distributed to the investing public. In April, 1972 the criminal reference report of the SEC was sent to the Department of Justice. In June, 1972, the matter was received by the United States Attorney for the Southern District of New York for prosecution and an Assistant United States Attorney was assigned. On May 17, 1973 the present indictment was returned.

Feinberg moved before trial for an order dismissing the indictment on the ground that the SEC investigation and

the civil action had violated his Fourth, Fifth and Sixth Amendment rights or, in the alternative, for an order suppressing all testimony and information provided by him during those proceedings and all leads therefrom. He also requested an evidentiary hearing. After extensive oral argument, the District Court (Judge Bauman) denied the motion without an evidentiary hearing on July 31, 1973, finding that the defendants had been warned of their constitutional rights in the SEC administrative proceeding and that:

> "[t]here was no duty upon the Government, once having advised the defendants of their right against self-incrimination, to warn them that as the investigation proceeded it might warrant prosecution—presentation to a grand jury and prosecution upon criminal charges.
>
> "With relation to the so-called compulsion, I adopt the language of Judge MacMahon in [Gellis] v. Casey, 338 F. Supp. 651 [, 653] (1972). Plaintiff has no Constitutional right to be relieved of the burden of the choice he faces. There is no violation of due process where a party is faced with the choice of testifying or invoking the Fifth Amendment. Any witness in a civil or criminal trial, who is himself under investigation or indictment is confronted with the dilemma of choosing to testify or to invoke his privilege against self-incrimination. Nevertheless, he must make the choice despite any extra-legal problems and pressures that might follow." (Hearing Tr., July 31, 1973, at 28-29.)

Judge Bauman also found that the SEC had instituted the civil proceedings in good faith to protect the investing public and that there was no basis and no showing to justify a hearing:

> "I haven't heard one word that leads me to the conclusion that the United States—that the SEC did

> not institute the civil suit in good faith. Certainly, everything that eventuated, the entire chronology of this, makes perfectly clear to me that the civil suit was to perform the function of the SEC, namely, to protect the investing American public; it set about getting the money back, it got . . . a substantial amount of money back for the investors, and that is what the civil suit is about.
>
> . . . .
>
> "I tell you, I am going to deny your motion and I am also going to deny a hearing. I see no basis and no showing upon which I should have a hearing.
>
> "I was going through the factors which led me to believe, and which should lead anybody to believe, the objective factors, that the SEC brought this civil suit in perfectly good faith." *Id.* at 26-27.

On this appeal, appellant reiterates the arguments made below and urges that the District Court erred in refusing to hold a hearing. These contentions, as we demonstrated below, are completely without substance.

Feinberg first claims that his rights were violated when he was called as a witness during the SEC investigation and again during the civil trial because "the SEC at no time during the pendency of its investigation or the civil action disclosed its intent to criminally refer this matter to the United States Attorney." (Br. 26).

Feinberg first appeared before the SEC in February 1971 accompanied by counsel. At the very outset of the interview, the following exchange took place:

> "Mr. Beirne: Thank you.
>
> "Now, Mr. Feinberg, as is customary in proceedings of this kind, I wish to advise you as follows:
>
> "Anything which you say in response to my questions can be used against you in a subsequent proceeding by the Securities and Exchange Commission or by any other Governmental agency.

"*That proceeding could be civil or it could be criminal.*

"Do you understand that, Mr. Feinberg?

"Mr. Feinberg: Yes, I understand it.

"Mr. Beirne: You are entitled to be represented by counsel of your choice.

"Mr. Bernstein has accompanied you here this morning, and I assume that you want to be represented by him. Is that correct?

"Mr. Feinberg: Yes.

"Mr. Beirne: Mr. Feinberg, you have the right to refuse to answer any question which I may ask you, the answer to which you feel would subject you to criminal prosecution, would tend to incriminate or degrade you or subject you to fine, penalty or forfeiture.

"Now, if I should ask you a question of that type, make that fact known to me, and I will immediately desist from such question—such line of questioning.

"Do you understand that is your Fifth Amendment privilege, Mr. Feinberg?

"Do you understand that?

"Mr. Feinberg: Yes, I think I do.

"Mr. Beirne: Well, in short, what it is, you do not have to incriminate yourself.

"You do not have to answer a question which you feel would tend to incriminate you.

"In other words, by answering the question, you would be incriminating yourself.

"If you think that is about to happen, under the Fifth Amendment to the United States Constitution you have the right to refuse to answer the question.

"Mr. Feinberg: I understand.

"Mr. Beirne: And if you should so refuse, as I said, I would immediately stop that type of questioning.

"Mr. Feinberg: Okay.

"Mr. Beirne: Finally, Title 18, Section 1001 of

the United States Code makes it a crime to make an untrue statement to a Federal officer.

"By virtue of the Formal Order which I referred to Mr. Todd, Mr. Kelly and myself are Federal officers.

"Therefore, an untrue statement made to us would constitute a violation of the—of Title 18, Section 1001. **It would be a crime.**

"Do you understand that?

"**Mr. Feinberg: Yes.**

"Mr. Beirne: All right.

"Mr. Feinberg, under all the circumstances that I have outlined to you, are you willing to testify here today in connection with Manor Nursing Centers?

"Mr. Feinberg: Of course."

(Transcript of Proceedings before the Securities and Exchange Commission in the matter of Manor Nursing Centers, Inc., February 12, 1971, pp. 3-5, Exhibit 1 to affidavit of Howard Wilson, Assistant United States Attorney, sworn to July, 1973) (emphasis added)

In view of these extensive and thorough warnings it is frivolous for Feinberg to argue that he was not on notice that his testimony could be used against him in a criminal case. Not only was he so apprised by the SEC, he also was accompanied by counsel on each occasion when he testified. Additionally, as a matter of law, the possibility of criminal consequences from acts violating the securities laws are implicit within the laws themselves, even in the absence of warnings. *United States* v. *Parrott*, 425 F.2d 972, 976 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970); *United States* v. *Light*, 394 F.2d 908, 913-14 (2d Cir. 1968).

In fact, the best evidence that Feinberg understood the clear import of these warnings is his own testimony in the trial below:

"Q. Mr. Feinberg, did you appear in the SEC on the morning of February 12, 1971, the first thing you were told is that there might be criminal proceedings and you had a right not to say anything?

"A. That's right. You told me at the grand jury too. Five or six times.

"Q. That's right. But you knew it on February 12, 1971, isn't that right, when the SEC told it to you?

"Mr. Seidman: If your Honor please, I object to that. Knew what?

"The Court: Knew that he could be prosecuted.

"Mr. Seidman: All right, fine. Let him put that in.

"The Court: Did you know before you appeared before the SEC that you could be prosecuted?

"The Witness: Everybody told me that, sir." (Tr. 1868-69).

Feinberg further complains that the SEC investigation and civil proceedings were conducted to procure evidence for a possible criminal prosecution. Wholly apart from the utter lack of concrete factual support for this contention, *infra*, p. 20, it is difficult to imagine a clearer instance than this case of the SEC simply fulfilling its statutory responsibilities of protecting the public investor by seeking equitable relief civilly, then determining whether the case is an appropriate one for consideration of criminal action by the Department of Justice. 15 U.S.C. § 77t. After Judge Motley's injunction and appointment of a trustee in the civil case, more than $600,000 was recovered from the defendants and restored to public investors. Following those proceedings, the Justice Department, carrying out its obligation to enforce the criminal laws, initiated a grand jury investigation followed by a criminal prosecution.

In *United States* v. *Parrott*, 315 F. Supp. 1012 (S.D.N.Y. 1969), Judge Weinfeld denied without a hearing defen-

dants' post-trial motions for dismissal based in part on allegations that the SEC had used its investigation to further an eventual criminal prosecution by the United States Attorney:

> "Neither is there any basis for the charge that the civil or administrative proceedings were instituted for an improper purpose, or to deprive them of their rights, or to aid in any criminal proceedings that might be indicated as a result of continued investigation. The Securities and Exchange Commission, where it believes the Securities Acts are being violated, is authorized, and indeed would be derelict if it failed, to investigate and to bring civil suit to enjoin alleged illicit activities . . . The commencement of such proceedings, however, does not automatically immunize from criminal prosecution those who may be civilly restrained if the charged conduct also violates the criminal statutes." *Id.* at 1015.

Judge Weinfeld also held that the civil suit was "ample notice" that defendants' conduct might well be subject to criminal penalties as well as civil injunction and that there was no right to be notified thereafter that the case might be referred to the Department of Justice for criminal prosecution:

> "There was no duty upon the government, once, having advised the defendants of their right against self-incrimination, to warn them that as the investigation proceeded it might warrant presentation to a grand jury and prosecution upon criminal charges [citing *United States* v. *Sclafani*, 265 F.2d 408, 415 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959)]. *Id.*

This Court affirmed that decision in *United States* v. *Parrott*, 425 F.2d 972, 976 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970), noting:

> "The claim that pressing the civil proceedings while allegedly concealing the intent to prosecute criminally was unfair has considerable appeal. However, the Parrotts could have exercised their privilege against self-incrimination in the civil proceedings; thus the prior civil proceedings did not coerce appellants unfairly to incriminate themselves. *United States* v. *Kordel*, 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1 (Feb. 24, 1970)."

Cf., Securities and Exchange Commission v. *Stewart*, 476 F.2d 755, 759-63 (2d Cir. 1973) (dissenting opinion).

Feinberg's reliance on the District of Columbia case of *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965) is wholly misplaced. As Judge Weinfeld noted, 315 F. Supp. at 1016, the cases upon which the District Court in that case relied have not been accepted by this court. *United States* v. *Sclafani, supra*, at 414-15; *United States* v. *Mahler*, 254 F. Supp. 581, 583 (S.D.N.Y. 1966). Furthermore, the facts in the District of Columbia case are readily distinguishable from both the present case and the New York *Parrott* cases: in those cases not only had the SEC already forwarded its criminal reference report to the Department of Justice eight months before the commencement of the civil trial, but the SEC had actually denied that criminal proceedings were pending. 248 F. Supp. at 199.

Equally without basis is Feinberg's reliance on *United States* v. *Kordel*, 397 U.S. 1 (1970). In that case, the Government first commenced civil *in rem* proceedings against certain products of the defendant and served interrogatories prepared by the Food and Drug Administration. Before the interrogatories were answered, the Government commenced a criminal investigation (and so notified the defendants) culminating in an indictment. Defendants' motion for a stay in the civil action pending the outcome of the criminal case was denied by the District Court, and the denial was sustained by the Supreme Court, which held that

answers to the interrogatories were not involuntarily given since each of the individual defendants (just as Feinberg in the present case) could have asserted, but did not, his privilege against self-incrimination. The Court also rejected the argument that the civil and criminal actions—which proceeded at the same time—violated due process or were otherwise improper:

> "The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.* at 11.

The Court's analysis applies directly to SEC enforcement of the nation's securities laws and to this case.

Nor is Feinberg's argument aided by the Court's statement in *Kordel* that it is not dealing with a case where (1) the Government has brought a civil action "solely to obtain evidence for its criminal prosecution," or (2) the Government has failed to advise the accused that it contemplates criminal action, or (3) the defendant is without counsel or fears prejudicial publicity, or (4) "other special circumstances." *Id.* at 11-12.

There is no issue of counsel or publicity in this case and Feinberg has not demonstrated any basis for even the

suggestion that the SEC action was brought solely to aid a possible criminal investigation. As for advising the accused of contemplated criminal action, there is nothing to indicate that in February 1971, when Feinberg testified before the SEC, any criminal action was contemplated; the criminal reference report came a year and a half later. Furthermore, the three cases cited by the Court in *Kordel* as examples of the Government's failure to adequately advise the accused of contemplated criminal action were all cases where defendants were without counsel at the time of questioning or production of documents and never given their constitutional warnings in any fashion. *Id.* at 12 n. 24. Finally, the only "other special circumstances" the Court apparently had in mind were where there were parallel criminal and civil proceedings in which the defendant requests deferral of the civil matter. *Id.* at 12 n. 27.

The Supreme Court's decision in *Donaldson* v. *United States*, 400 U.S. 517 (1971), further confirms that the investigation in the present case did not transgress Feinberg's constitutional rights. In *Donaldson* the taxpayer claimed that it was improper for an IRS special agent to issue a summons for the production of records in the possession of the taxpayer's former employer and the latter's accountant, because the investigation might result in a recommendation for criminal prosecution. Mr. Justice Blackmun, writing for the majority, held that since Donaldson was not under indictment and since no recommendation had been made for his prosecution, the summons had been properly issued:

> "That he might be indicted and prosecuted was only a possibility, no more and no less in his case than in the case of any other taxpayer whose income tax return is undergoing audit. Prosecution will necessarily depend on the result of that audit and on what the examination and investigation reveal." 400 U.S. at 534.

Under *Donaldson*, unless the *sole* purpose of the agency's administrative investigation is to gather evidence for a criminal prosecution, the exercise of its investigatory powers is not subject to challenge on Fifth Amendment grounds. *Id.* at 533. See also *United States* v. *Churchill*, 483 F.2d 268, 271-72 (1st Cir. 1973).

In the present case, there is no evidence whatsoever that would even remotely suggest that the *sole* purpose of the SEC investigation or civil proceeding was to secure incriminating evidence for criminal purposes. Indeed, the record is plainly to the contrary, as the District Court found.* Under these circumstances, Feinberg's due process claim must fail. Likewise, the argument based upon the self-incrimination clause of the Fifth Amendment must be rejected, since he waived his privilege knowingly, voluntarily and with the advice of counsel before he testified at the SEC in February 1971 and never invoked the privilege thereafter.

Feinberg's contention that he should have been given a hearing to determine whether the SEC investigation and proceedings were conducted to procure evidence for a criminal prosecution is equally frivolous. His motion below rested exclusively on the conclusory allegations of defense counsel's affidavit which baldly asserted that the SEC from the beginning "contemplated an undisclosed intent" to aid and abet a criminal prosecution; that the SEC committed an illegal search and seizure, violated Feinberg's privilege against self-incrimination, and denied his right to counsel; and that the administrative proceedings were being "utilized" illegally. (App. 21a-22a). As of this appeal those conclusory charges remain unsupported by specific factual allegations.

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* Even if it were otherwise, the Government made no use of Feinberg's previous testimony in its case in chief. Nor has Feinberg alleged even on this appeal that the testimony was used by the Government in any substantial way in its criminal investigation of him.

Evidentiary hearings, as this Court has repeatedly held, "should not be set as a matter of course, but only when the petition alleges *facts* which if proved would require the grant of relief." *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960) (emphasis added); see also *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970); *United States* v. *Pardo-Bolland*, 229 F. Supp. 473, 475 (S.D.N.Y. 1964), *aff'd*, 348 F.2d 316 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965); *United States* v. *Brown*, Dkt. No. 74-1947 (2d Cir., February 20, 1975) slip op. 1847, 1850-51; *Cohen* v. *United States*, 378 F.2d 751, 760-61 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967); *United States* v. *Cranson*, 453 F.2d 123, 126-27 (4th Cir. 1971). Here the moving papers laid no foundation whatsoever for the holding of a hearing. *Lawn* v. *United States*, 355 U.S. 339, 348-49 (1958). Defense counsel's supporting affidavit, instead of alleging evidentiary facts, offered nothing more than vague, conclusory allegations in support of his request for a hearing. Under these circumstances we submit that the District Court acted well within its discretion in denying appellant the fishing expedition to which he claims he was constitutionally entitled.*

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* Feinberg's one-sentence argument based on *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), that the "coercive pressure of the SEC" caused him to waive his Fifth Amendment privilege, is also unavailing. Feinberg has made no showing whatever that his exercising his privilege against self-incrimination during testimony before the SEC or in the civil trial would automatically or even probably result in his being penalized or suffering a loss. "Such a person must make a decision; and, as *Kordel* holds, if he chooses to testify, his testimony may be used against him in a subsequent criminal prosecution." *Securities and Exchange Commission* v. *Stewart*, 476 F.2d 755, 761 (2d Cir. 1973) (dissenting opinion); *United States* v. *Simon*, 373 F.2d 649 (2d Cir.), *cert. granted* as *Simon* v. *Wharton*, 386 U.S. 1030, *vacated as moot*, 389 U.S. 425 (1967); *DeVita* v. *Sills*, 422 F.2d 1172, 1177 (3d Cir. 1970); *Gellis* v. *Casey*, 338 F. Supp. 651, 653 (S.D.N.Y. 1972); *United States* v. *Sloan*, 388 F. Supp. 1062, 1063 (S.D.N.Y. 1975).

POINT II

FEINBERG'S INABILITY TO CONFER IMMUNITY ON EZRINE DID NOT DENY FEINBERG THE EQUAL PROTECTION OF THE LAWS.

Neither side called Ivan Ezrine as a witness at the trial. A significant portion of the summation on behalf of Feinberg, however, was devoted to emphasizing that the Government had not called Ezrine as a witness and to implying that if it had, Ezrine would have corroborated the testimony of Feinberg and cleared him of wrongdoing. (Tr. 2318-19; 2327-29; see also, Tr. 2417)

Despite having chosen not to call Ezrine as his own witness, Feinberg now argues that his constitutional right to equal protection was abridged because if he had called him, Ezrine might have asserted his privilege against self-incrimination, whereas if the Government had called Ezrine it could have applied for an order granting him immunity. Feinberg also asserts that because he could not grant immunity, Ezrine was not equally available to the defendant and the Government. The argument is devoid of merit.

In the first place, Feinberg's assumption that if called as a defense witness, Ezrine would have refused to testify is the sheerest speculation. He was neither called to testify nor, so far as the Government knows, was he ever asked whether he would testify. By the time of the trial, he had pleaded guilty to conspiracy, securities fraud, mail fraud, and false statements to the SEC, and filed with the Court a lengthy affidavit setting forth the details of his wrongdoing. All this was known to Feinberg and the factual affidavit was part of the public record. In light of this substantial previous incrimination, it can hardly be assumed that Ezrine would have refused to testify as to Feinberg's activities on Fifth Amendment grounds.

But even if Ezrine had been called and refused to testify, the law is well established in Federal courts that the fact that immunity may be granted upon the application of the United States Attorney but not of the defendant is not a denial of the equal protection guarantee of the Fifth Amendment and does not abridge a defendant's right to summon witnesses safeguarded by the Sixth Amendment.

In *Earl* v. *United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967), the co-defendant pleaded guilty before trial but was not called as a witness by the Government. The defendant called him as a witness, but the co-defendant on advice of counsel, refused to testify. The defendant argued on appeal that the co-defendant should have been granted immunity. The Court of Appeals through Judge Burger, now Chief Justice of the United States, disagreed:

> "Here the prosecution has not affirmatively withheld a witness or concealed evidence; it transported the witness from a Federal Prison and produced him in court. At that point the witness declined, on Fifth Amendment grounds, to testify. What Appellant asks this Court to do is command the Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony . . . We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power." *Id.* at 534.

In *In Re Kilgo*, 484 F.2d 1215 (4th Cir. 1973), the defendant made precisely Feinberg's claim here. In rejecting the argument, the Court of Appeals made the following observations:

> "The Constitution reflects the historical precedents and the practical reasons for confining the power to grant immunity to the prosecutorial officers of the

> government. The sixth amendment assures an accused 'compulsory process for obtaining witnesses in his favor.' But the authors of the Bill of Rights did not deem it essential to enhance this right by empowering the accused to confer immunity, and nowhere in the Constitution do we find any justification for conditioning the government's ability to grant immunity on a corresponding grant to private individuals." *Id.* at 1222.

The other courts that have considered Feinberg's constitutional arguments addressed to the immunity statute have rejected them. *United States* v. *Berrigan*, 482 F.2d 171, 190 (3d Cir. 1973); *United States* v. *Smith*, 436 F.2d 787, 790 (5th Cir.), *cert. denied*, 402 U.S. 976 (1971); *United States* v. *Allstate Mortgage Corporation*, 507 F.2d 492, 494-95 (7th Cir. 1974); *United States* v. *Ramsey*, 503 F.2d 524, 532-33 (7th Cir. 1974); *United States* v. *Lyon*, 397 F.2d 505, 512-13 (7th Cir.), *cert. denied* as *Lyszyk* v. *United States*, 393 U.S. 846 (1968); *Cerda* v. *United States*, 488 F.2d 720, 723 (9th Cir. 1973); *United States* v. *Jenkins*, 470 F.2d 1061, 1063-64 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *Morrison* v. *United States*, 365 F.2d 521, 524 (D.C. Cir. 1966).

POINT III

THE TRIAL COURT PROPERLY DENIED FEINBERG'S MOTION FOR "3500 MATERIAL" OF EZRINE WHO DID NOT TESTIFY.

Since Ezrine was not a Government witness, Judge Lasker denied Feinberg's motion for all "3500 material" as to him (Tr. 2097-98). Feinberg claims that this was error under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The contention is groundless.

Ezrine's 3500 material, if he had been a Government witness, would have consisted of his testimony in the civil

trial (in which Feinberg was also a party and was a witness), the affidavit he filed with the Court on October 30, 1974, the day he pleaded guilty to the indictment, and his testimony before the SEC. Feinberg knew of the existence of all this material, which was easily obtainable by him but never requested either in his pre-trial motions or at trial by motion or subpoena.* "Even where evidence falls within the rule of *Brady* v. *Maryland* . . . however, the Government need not *sua sponte* give notice to the defense where the accused has knowledge of the evidence." *United States* v. *Purin*, 486 F.2d 1363, 1368 n.2 (2d Cir. 1973), *cert. denied*, 417 U.S. 930 (1974).

The *Brady* claim here is patently frivolous. *Brady* held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process." *Id.* at 87. There is not the slightest showing by Feinberg on this appeal—nor was there below—that the Government suppressed any evidence exculpatory of or favorable to Feinberg.

In *Williams* v. *United States*, 503 F.2d 995 (2d Cir. 1974), a co-defendant named Roseboro who pleaded guilty prior to the trial of Williams, testified in a subsequent trial not involving Williams. In that trial Roseboro said that "on a few occasions" he had told the Government that Williams was not involved in the criminal activities for which Williams had earlier been convicted. Williams moved to vacate his judgment of conviction or for a hearing on the grounds that the Government had knowledge of this exculpatory statement before his trial and failed to disclose it, contrary to *Brady*. This Court affirmed the denial of the motion, stating:

> "Assuming that the Government was aware that Roseboro would so testify if called, it was not re-

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* Virtually every aspect of Ezrine's SEC testimony was covered with much greater thoroughness during the civil trial.

> quired to make this known since Appellant was also on notice of the essential facts which would have enabled him to call Roseboro and thus take advantage of any exculpatory testimony that he might furnish." *Id.* at 998.

Similarly, in *United States* v. *Stewart*, Dkt. No. 74-2468 (2d Cir., March 26, 1975), Slip. op. 2527, one Ruddock, not a witness at the defendant's first trial, was called as a witness at his re-trial. In a statement given to the FBI, he had referred to the other six participants in the bank robbery with which the defendant had been charged, but omitted any mention of the defendant. The defendant claimed that the Government's failure to disclose Ruddock's statement at the first trial violated *Brady*. This Court disagreed:

> "Ruddock's identity and alleged participation in the robbery were known to Stewart at least six weeks prior to his first trial. Stewart could have interviewed Ruddock prior to that trial or called him as a witness at that trial. The Government is not required to make a witness' statement known to a defendant who is on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish." *Id.* at 2532.

See also, United States v. *Tramunti*, 500 F.2d 1334, 1349-50 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3349 (1974); *United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States* v. *Brawer*, 496 F.2d 703 (2d Cir. 1974). Unlike the above cases, here Feinberg has made neither a showing nor even a claim that anything Ezrine ever told the Government was exculpatory of Feinberg. Furthermore, Ezrine was

known to Feinberg as a person integrally involved in these transactions and therefore as a potential witness. Feinberg thus was incontrovertibly on notice of the essential facts which would have enabled him to call Ezrine as his witness. His *Brady* claim is therefore meritless.

POINT IV

FEINBERG'S OTHER CLAIMS ARE WITHOUT MERIT.

1. The securities fraud counts alleged separate crimes.

Counts 2 through 14 of the indictment alleged substantive violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Feinberg was convicted of counts 9 through 14 and sentenced concurrently on each.

Citing *United States* v. *Hughes*, 195 F. Supp. 795 (S.D. N.Y. 1961) and *United States* v. *Greenberg*, 204 F. Supp. 400, 30 F.R.D. 164 (S.D.N.Y. 1962), Feinberg urges for the first time on appeal that counts 2 through 14 should have been consolidated into a single count because the essence of the crime was fraud, the requirement of use of the mails being merely jurisdictional.

This Court has squarely held otherwise in *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir. 1974), *cert. denied*, — U.S. —, 48 U.S.L.W. 3212 (Oct. 15, 1974). There the defendant had been convicted on two counts of securities fraud, each count being a mailing of a confirmation in furtherance of the single fraud. This Court held:

> "It is true that there has been debate in the past over whether such transactions constitute a multiple offense, the essence of the violation being illegal use of the mails, or a single offense, the essence being fraud. See 3 Loss, Securities Regulation 1521 (2d

ed., 1961); and also *United States* v. *Hughes*, 195 F. Supp. 795 (S.D.N.Y. 1961). However recent litigation involving fraud under the securities laws has resolved this debate in favor of the position that each transaction in a securities fraud case constitutes a separate offense. . . The consecutive sentences on counts 16 and 17 were therefore proper." 492 F.2d at 83.

Furthermore, having failed to assert this defense below, appellant is barred from raising it on appeal. Fed. R. Crim. P. 12(b)(2); *cf. United States* v. *Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3584 (April 29, 1975).

2. It was not prejudicial for Judge Lasker to instruct counsel that "if anything comes out of this case there is a right to apply to the Court of Appeals."

Following repeated instances of defense counsel arguing with the district court in front of the jury and endless frivolous objections to questions and rulings * a Govern-

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* At one point Judge Lasker made the following comments out of the presence of the jury:

"I have just stated to Mr. Seidman [off] the record and believe he is entitled to have me state it on the record that I have never heard such baloney in my life. The Court of Appeals will be free to read this. The jury doesn't hear it.

"I have never endured such delays and obstructions as I have endured in this case. Everything should be on the record. In case there is a conviction, I want the Court of Appeals to understand the difficulties that have been faced by the trial court in trying this case.

"I believe that there are many other judges in this court who would have either invoked the contempt power or ordered a cessation to the objections and obstructions that have occurred in this case.

. . . .

[Footnote continued on following page]

ment witness testified that he had attended a number of meetings with Feinberg and Ezrine during a certain period of time, but he could not recall the precise date of each meeting. The witness was then asked whether the subject of these meetings was the same, and counsel for Feinberg objected to the question as leading. The District Court overruled the objection, whereupon counsel volunteered that he thought a proper question would have been, "what was said at meeting number 1." Then the following exchange occurred:

> "The Court: That's what you think, and you are overruled.
>
> "Mr. Seidman, I must instruct all counsel in this case merely to make an objection, accept a ruling and sit down. If anything comes out of this case there is a right to apply to the Court of Appeals. That panel of judges will review my rulings and decide whether I am correct or not. It's improper for an attorney to argue with the judge after a ruling. I make no pretense to be infallible. I am doing my duty as I see it and I am judging as I believe the law to be.
>
> "Mr. Seidman: I apologize to your Honor. I didn't intend it in that way, Your Honor.
>
> "The Court: Now, let's get along so we can try this case and the jury can ultimately some day resume its occupation—its normal occupation.
>
> "Mr. Seidman: I hope so." (Tr. 737-38)

". . . I can say this trial is unique in the history of my experience here. My experience here is not as long as that of many other judges, but it has lasted now for over six years, and I have tried hundreds of cases, and I have never, never, never run into anything like this case." (Tr. 1822, 1824)

Feinberg now claims for the first time that this exchange deprived him of his right to a fair trial. The claim is wholly devoid of merit on its face. There was nothing in this exchange (directed to counsel, not to the jury) or in anything else Judge Lasker said that conveyed to the jury the impression that the court thought the accused was guilty. *United States* v. *Guglielmini*, 384 F.2d 602, 604-05 (2d Cir. 1967). The trial court's remarks may be the basis for reversal only if they destroy the "impartial, judicious, and, above all, responsible . . . courtroom atmosphere in which guilt or innocence [must] be soberly and fairly tested." *United States* v. *Brandt*, 196 F.2d 653, 655-56 (2d Cir. 1952). Although Judge Lasker's patience was tried more than once during this long trial, he never displayed the slightest impartiality or injudicious conduct to the jury, much less did he destroy Feinberg's right to a fair trial. *United States* v. *Williamson*, Dkt. No. 75-1025 (2d Cir. May 1, 1975) slip op. 3383 at 3385; *United States* v. *Cuevas*, 510 F.2d 848, 850 (2d Cir. 1975); *United States* v. *Hendrix*, 505 F.2d 1233, 1237 (2d Cir. 1974); *United States* v. *Kaylor*, 491 F.2d 1127, 1130 (2d Cir. 1973); *United States* v. *Weiss*, 491 F.2d 460, 467-69 (2d Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3209 (Oct. 15, 1974); *United States* v. *Gonzalez*, 483 F.2d 223, 225-26 (2d Cir. 1973); *United States* v. *Newman*, 481 F.2d 222, 223-24 (2d Cir.), *cert. denied*, 414 U.S. 1007 (1973); *United States* v. *Colabella*, 448 F.2d 1299, 1301-03 (2d Cir. 1971), *cert. denied*, 405 U.S. 929 (1972).

Furthermore, there was no objection below to the challenged remark. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966); *see*, *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974). In *United States* v. *Cirillo*, 499 F.2d 872, 889 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. —— (1974), upon which Feinberg relies, the defendants

excepted to the questionable instruction (addressed to the jury rather than to counsel). Even though the issue had been preserved for appeal, this Court held that any error in giving the instruction was clearly harmless. *Id.*

3. Feinberg's sentence was imposed legally and properly.

Without any proof whatsoever to support the accusation, Feinberg alleges that the "motivation of the Court" in sentencing him to imprisonment for 18 months was "questionable." * Feinberg received the same sentence as Ezrine, the other principal architect of this scheme. The claim that the sentence was illegally imposed is wholly without merit.

As Feinberg concedes, it is a firmly established principle of federal criminal practice that appellate courts, absent extraordinary circumstances not present here, will not review sentences. *Dorszynski* v. *United States*, 418 U.S. 424, 440-41, 443 (1974); *United States* v. *Tucker*, 404 U.S. 443, 446-47 (1972); *Gore* v. *United States*, 357 U.S. 386, 392 (1958); *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932); *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973).

Feinberg's contention that "sentence was imposed illegally" (Br. 43) is supported only by his unsupported assertion that "the Court had a fixed or rigid policy" in imposing sentence. (*Id.*) The record here refutes the claim. Compare *United States* v. *Schwarz*, 500 F.2d 1350, 1351-52 (2d Cir. 1974). Even if federal appellate courts routinely reviewed sentences, there would be nothing in

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* The maximum sentence which could have been imposed was imprisonment for 57 years and a fine of $30,000.

Judge Lasker's sentencing of Feinberg to suggest the slightest degree of impropriety or undue harshness—and Feinberg has pointed to nothing. Far from being unduly harsh, appellant's sentence was commensurate with his crimes, was within the statutory limits and was imposed in a lawful manner. There is no basis for disturbing that sentence on this appeal.

4. Whether Feinberg's beliefs raised a reasonable doubt as to his guilt was a question of fact, which the jury under proper instructions decided against him.

Feinberg does not contend that the evidence was insufficient for his conviction, nor does he urge that Judge Lasker's instructions to the jury were improper. Rather, he argues that his good faith and "honest belief in the enterprise" (Br. 45) raised a reasonable doubt as to his guilt. The dispositive answer to this claim is that the jury heard the evidence, the arguments, and the District Court's charge and decided these issues against him. Viewed in the light most favorable to the Government, the record here, including the evidence presented by the defense, amply supports the verdict. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Koss*, 506 F.2d 1103, 1106 (2d Cir. 1974), *cert. denied*, —U.S.—, 43 U.S.L.W. 3551 (April 15, 1975).

In his charge to the jury, Judge Lasker emphasized repeatedly that they must acquit the defendant unless they found beyond a reasonable doubt that he knowingly, wilfully and intentionally conspired and engaged in the fraudulent scheme charged in the indictment. (Tr. 2427-34, 2439-40, 2444). Moreover, as to the conspiracy count, he charged that the Government must prove that Feinberg knew that "the public was being deceived or defrauded as a result of the scheme and his participation must have been intentional or on purpose." (Tr. 2440) Later in his charge,

Judge Lasker gave a clear and extensive instruction as to what constituted knowledge and willfulness (Tr. 2458-61), repeated his charge that the Government must establish specific fraudulent intent (Tr. 2461), and explicitly instructed the jury that Feinberg's alleged reliance on counsel, while not a defense in itself, was a proper factor for the jury's consideration in evaluating whether Feinberg possessed the requisite criminal knowledge and intent. (Tr. 2458).

Under these unexceptionable instructions, the jury decided the issue of Feinberg's good faith and all other matters touching upon his credibility and that of the other witnesses. That they rejected this defense of good faith is a matter which is not reviewable on this appeal. *United States* v. *Brown*, 335 F.2d 170, 172 (2d Cir. 1964); *United States* v. *Tutino*, 269 F.2d 488, 490-91 (2d Cir. 1959); *United States* v. *McGuire*, 381 F.2d 306, 315-16 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); see also *United States* v. *Koss*, *supra*, 506 F.2d at 1111; *United States* v. *Mallah*, 503 F.2d 971, 981 (2d Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3515 (March 25, 1975); *United States* v. *Stromberg*, 268 F.2d 256, 266-67 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States* v. *Markman*, 193 F.2d 574, 576 (2d Cir. 1952); *United States* v. *Compagna*, 146 F.2d 524, 526 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945); *United States* v. *Manton*, 107 F.2d 834, 839 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Richard J. Hoskins being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12th day of May 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Irving Seidman, Esq.
425 Park Ave.
N.Y.C. 10022

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Richard J Hoskins

Sworn to before me this
12 day of May 75

Gloria Calabrese

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Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977